

(2005) 03 P&H CK 0193

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 282-SB of 1988

Keshar Singh

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: March 23, 2005**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 363, 366

Citation: (2005) 14 CriminalCC 269**Hon'ble Judges:** Baldev Singh, J**Bench:** Single Bench**Advocate:** J.S. Bedi, for the Appellant; Narender Sura, for the Respondent

Judgement

Baldev Singh, J.

Keshar Singh son of Sube Singh, aged about 25 years, a rickshaw puller, resident of Mohalla Kartarpura, Rohtak has filed this appeal against the impugned judgment of conviction dated 15.7.1988 and the impugned sentence order dated 16.7.1988 passed by Sh. J.D. Chandna, the then Additional Sessions Judge-III, Rohtak, vide which he was convicted for the offences punishable under Sections 363, 366 and 376 IPC and was sentenced to undergo RI for one year and to pay fine of Rs.250/- and in default of payment of fine to undergo further RI for three months u/s 363 IPC, to undergo RI for two years and to pay fine of Rs.250/- and in default of payment of fine to undergo further RI for three months u/s 366 UPC, and to undergo RI for 7 years and to pay fine of Rs.500/- and in default of payment of fine to undergo further RI for six months u/s 376 IPC. The sentences were ordered to run concurrently.

2. The facts of the prosecution case are that PW Inder Singh, a shikligar, lived with his family members near Bangar Cinema, Rohtak. On 22.12.1987 at about 10 a.m., his daughter Sheila Kaur went to the fields to ease herself. She did not return. On enquiries made by Inder Singh, it was found that appellant Keshar Singh had

kidnapped her. It was also noticed by him that 4/5 days earlier Sheila Kaur had complained to her mother that Keshar Singh-appellant was having an evil eye on her and he used to tell her that he would lift her bodily. Inder Singh searched for Sheila Kaur and Keshar Singh appellant on 22.12.1987 and 23.12.1987. Ultimately, he lodged report with the police on 23.12.1987. PW Tota Ram ASI of Police Station City, Rohtak along with other police officials was present near Bus Adda, Rohtak, PW Inder Singh presented application Ex.PK before him. He made his endorsement Ex.PK/1 and got this case registered. Ex.PK/2 is the copy of the FIR.

3. On 24.12.1987, PW Tota Ram ASI along with other police officials and Inder Singh and Smt. Asarfi was present in the area of Rohtak, near Delhi Bypass at about 11 A.M, Sheila Kaur and Keshar Singh - appellant were spotted coming towards them. The appellant was arrested. Sheila Kaur was recovered from his possession. Memo of recovery Ex.PL was prepared. Site plan Ex.PM was also prepared showing the place of arrest. The appellant and Sheila Kaur were got medically examined. The Medical Officer sealed the clothes of Sheila Kaur in a parcel. Similarly, the underwear of Keshar Singh-appellant was also sealed in a parcel. These were handed over to the police for sending the same to the Chemical Examiner.

4. On 25.12.1987 on the application Ex.PA moved by PW Tota Ram ASI, statement of Sheila Kaur was recorded by the Judicial Magistrate.

5. Report of the Chemical Examiner was received. Human semen was found on the underwear of the appellant. Human semen was also found on the "salwar" of Sheila Kaur and also on vaginal swabs. The police collected the school leaving certificate of Sheila Kaur, which mentioned her date of birth as 12.2.1973.

6. Statement of Sheila Kaur was also recorded by the police. She disclosed that on 22.12.1987, the appellant had taken her in a four-wheeler to Delhi. He had threatened her that he would kill her in case she raised alarm. So, she wandered with the appellant in the day time. At night time, he took her at Railway Station, Delhi. Next day, he took her in a quarter, which he had opened with a key. There he kept her for day and night and he had sexual intercourse with her. Next morning, he took her to Rohtak to arrange for the money and to enquire, if any report had been lodged with the police. They got down from a bus at Rohtak. He took her to one side of a brick-kiln, where there was growth of "kikkar" trees. He had sexual intercourse with her there also. Thereafter, the police apprehended her and the appellant.

7. On completion of the investigation, challan was put in against the appellant for the offences punishable under Sections 363, 366 and 376 IPC.

8. The case was committed to the Court of Session for trial. Charge was framed against the appellant for the offences punishable under Sections 363., 366 and 376 IPC. He did not plead guilty to the charge and claimed trial.

9. The prosecution at the trial had examined PW1 Sh. Virender Singh CJM, Rohtak, PW2 Dr. Kamlesh Wadhwa, PW3 Draftsman Dhani Ram, PW4 Rajinder Kumar, PW5 Constable Balbir Singh, PW6 Head Constable Dhoop Singh, PW7 Constable Ram Singh, PW8 Sheila Kaur prosecutrix, PW9 Inder Singh complainant, PW10 ASI Tota Ram and PW11 Dr. O.P. Dhania.

10. On the conclusion of the prosecution evidence, statement of the appellant was recorded u/s 313 Cr.P.C. He denied that he had kidnapped Sheila Kaur when she had gone to ease herself and took her to Delhi and other places and committed rape on her. He explained that Sheila Kaur used to visit his house. She was after him. He told his father and one Punnu Singh, neighbour of Sheila Kaur about it. Punnu Singh asked Inder Singh, father of Sheila Kaur, to stop his daughter from visiting his house. In spite of that Sheila Kaur did not stop visiting his house. On 21.12.1987, she came to his house in the presence of his parents. He sent his father to lodge a protest with Inder Singh, father of Sheila Kaur in this respect. Inder Singh came to their house and he took Sheila Kaur and him to the police station while beating him. The time was about 3 P.M. He was made to sit in the police station. He told the police that the girl was after him. The police wanted money from him through Umed Singh, a tout of the police. He refused to give money to the police. He was involved in this case.

11. The appellant examined DW-1 Punnu Singh and DW2 Amar Singh.

12. Arguments of the Ld. counsel for the appellant and of the advocate appearing for the respondent-State, were heard and record of the case was scrutinized.

13. The Ld. counsel for the appellant argued that the age of Sheila Kaur was above 16 years and she was a consenting party and as such the alleged offence of rape is not proved. He argued that the prosecution relied upon a school leaving certificate Ex. PG alone, which is proved by PW4 Rajinder Kumar, for proving the age of Sheila Kaur. Entry in the school register regarding age is not of much evidentiary value and is not conclusive. She was not subjected to ossification test. So, the finding regarding her age as below 16 years at the time of occurrence is wrong. The appellant should have been given the benefit of doubt and acquitted.

14. Ex. PG school leaving certificate shows her date of birth as 12.2.1973. She was kidnapped on 22.12.1987 and rape was committed on her on 23.12.1987. She was aged 14 years 10 months and 10 days on the day of occurrence. PW4 Rajinder Kumar, a teacher of the Government High School, Barshat, District Karnal brought the admission and withdrawal register of the school and proved certificate Ex. PG showing her date of birth as 12.2.1973. Besides this certificate, is the corroborative statement of PW9 Inder Singh, father of Sheila Kaur. He deposed that she was less than 15 years when on 22.12.1987 she was kidnapped. There is nothing on the record which may belie this certificate and the deposition of PW9 Inder Singh. Ossification test was necessary if this school certificate would not have been there.

Medical evidence has a margin of error. The Ld. Counsel for the appellant cited a few cases, in which it was observed that school certificate is not conclusive regarding age of the prosecutrix. Parents often give false age of the child at the time of admission, so that later in life the child would have an advantage of seeking public service for which minimum age is often prescribed. It is also argued that school leaving certificate has not been believed by judicial decisions in the absence of any other evidence such as register of village Chowkidar or register of Birth of Municipality. The Ld. Counsel for the appellant relied upon the following cases:-

1. Vasdev v. State of Haryana, 1985(1)CLR 192.
2. Om Prakash v. State of Punjab, 1983(2) CLR395.
3. Hira Lal v. State of Haryana, 1994(2) R.C.R. 435.
4. Mohd. Imteaz Khan @ Sannu v. State of Haryana, 1994(2) R.C.R. 456.
5. Kala Singh v. State of Punjab, 1996(3) R.C.R. 343.
6. Jaipal Singh v. State of Haryana, 2003(2) RCR(Cri.) 310.
7. Harpal v. State of Haryana, 2004(1) RCR(Cri.) 481.

15. On the other hand, determination of age of the prosecutrix on the basis of the school leaving certificate and in the absence of medical evidence, such as ossification test was justified by judicial decisions. Case of Rajan and others v. State of Rajasthan, 2003(2) RCR(Cri.)328, can be referred in this context. It was laid down that age of the prosecutrix be determined on the basis of birth certificate or school certificate. Medical evidence has a margin of error. It would be taken into consideration only when primary evidence, which is found in the birth certificate or school certificate, is not available. In the case of [Mohd. Ikram Hussain Vs. State of U.P. and Others](#), the Apex Court held that certified copies of school register, while deciding the question of age of a girl, amount to evidence under Indian Evidence Act, In [Bhoop Ram Vs. State of U.P.](#), , the Supreme Court held that on the point of age, school certificate is the best evidence and so far as the medical certificate is concerned, the same is based on estimate and possibility of error cannot be ruled out.

16. In these premises, I have no hesitation in supporting the finding recorded by the trial court that the age of the prosecutrix was below 16 years at the time of the occurrence,

17. Evidence of the prosecutrix (P W8) Sheila Kaur reveals that the appellant took her to Delhi in a four-wheeler. She wandered with him from place to place till it fell dark, During night time, they stayed at the railway station, That night, they did not do sexual intercourse, Next day, the appellant took her to place where there were quarters. He opened a quarter and kept her there for a day and night, He had sexual intercourse with her. Next day, he brought her to Rohtak to arrange for money and

also to see whether her parents had lodged report with the police, He took her to a brick-kiln and by the side of the growth of "kikkar" trees he had sexual intercourse with her, The Ld. counsel for the appellant argued that all this shows consent of the prosecutrix- Tacit consent, love affair on the part of the prosecutrix are meaningless when she is below 16 years and the same do not exonerate the appellant from the offence of rape u/s 376 IPC and of kidnapping u/s 366 IPC.

18. The 14- counsel for the appellant argued that in this case, the act of rape committed on prosecutrix Iheila Kaur is not proved He argued that there was no injury on the body of the prosecutrix. Her version that the appellant had sexual intercourse with her by the side of the brick-kiln amidst "kikkar" trees is not believable. Statement of Sheila Kaur (PW8) has got a ring of truth in it. There is nothing on record to disbelieve her. Medical evidence supports her contention that rape was committed on her. PW2 Dr. Kamlesh wadhwa had medically examined her. His statement reveals that there was no external mark of injury on her private parts. Hymen was congested. It was ruptured. After seeing the report of the Chemical Examiner Ex.PE, Dr. Kamlesh Wadhwa gave opinion that sexual intercourse had been done with Sheila Kaur. The vaginal swabs and the salwar had human semen. Underwear of the appellant, as per report of the Chemical Examiner, had also human semen. Statement of PW2 Dr. Kamlesh Wadhwa stands unimpeached. So, it is cogently established that Sheila Kaur was subjected to rape by the appellant.

19. The defence version was rightly discarded by the trial Court. Both the defence witnesses were found unbelievable as they did not support the appellant on many aspects. The conviction of the appellant for the offences under Sections 363, 366 and 376 IPC is maintained.

20 The Ld. counsel for the appellant submitted that the appellant was aged about 25 years at the time of his conviction recorded on 15.7.1988. He remained in custody for about 4-1/2 months before conviction and for about one month after conviction. He was a poor rickshaw puller. By now, he has settled in life. The prosecutrix must have been married and well settled in life. Hence, the conviction for the offences under Sections 363, 366 and 376 IPC may be maintained, but the sentence be reduced to already undergone. He cited the case of Rupavath Moti Ram v. State of Andhra Pradesh, 2004(1) RCR 885. Offence of rape was witnessed by the mother and brother of the victim. Minimum sentence of 7 years is prescribed. However, sentence of 4 years was awarded. Accused was a labourer. His parents were old and the children were of tender age. It was observed that social factor has also to be considered. In the case of Rajpal v. State of Haryana, 2005(3) CCC 394 (P&H): 2005(1) RCR(Cri.) 635, the appellant was convicted u/s 376 IPC. He had faced trial for 9 years. He was the sole bread earner of the family. The sentence was reduced from 7 years to already undergone (4 years). In the case of Hariram v. State of Haryana 1992(1) RCR 326, the appellant was convicted u/s 376 IPC and the prosecutrix was below 16 years. He was aged about 21 years. Sentence was reduced to already undergone i.e.

more than one year. In the case of Narender Singh v. State of Haryana, 2003(3) CCC 517 (P&H); 2003(4) RCR(Cri.) 346, the appellant was convicted u/s 376 IPC. He faced trial for 14 years. The prosecutrix was married and well settled in life. Accused was also married and having children. Sentence was reduced to already undergone i.e. 9 months.

21. In the case in hand, the sword of Damocles has been hanging on the head of the appellant for more than 16 years. He is not a previous convict. During this period, he has not committed any offence and has led peaceful life. He and the prosecutrix have, by now, settled in life. The sentence imposed by the trial court on the appellant for the offences under Sections 363 and 366 IPC shall remain intact. However, the ends of justice would meet if for the offence of rape u/s 376 IPC, the sentence is reduced from 7 years to 2 years. Fine of Rs.500/- and the defaulting clause shall remain intact. Sentences are to run concurrently.

22. The Chief Judicial Magistrate, Rohtak would issue warrant of arrest to commit the appellant to jail to undergo remaining period of sentence.

Appeal stands disposed of accordingly.